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24 *Bard Peripheral Vascular, Inc.*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

IN RE: Bard IVC Filters Products Liability Litigation

No. 2:15-MD-02641-DGC

**DEFENDANTS' RESPONSE IN
OPPOSITION TO PLAINTIFF'S
MOTION *IN LIMINE* NO. 12 TO
EXCLUDE DR. KANG'S SOCIAL
MEDIA**

(Assigned to the Honorable David G.
Campbell)

1 Defendants C. R. Bard, Inc. and Bard Peripheral Vascular, Inc. (collectively
 2 “Bard”) submit this response in opposition to Plaintiff’s Motion *in Limine* No. 12 and
 3 respectfully show the Court as follows:

4 **ARGUMENT AND CITATION OF AUTHORITY**

5 The Court should deny the Plaintiff’s Motion to exclude Dr. Brandon Kang’s
 6 public social media posts that reflect his approach to and attitude about filter removal.
 7 The posts are plainly relevant to the central issue of whether Dr. Kang’s retrieval was
 8 unduly aggressive in this case. Moreover, the Plaintiff failed to show that the evidence’s
 9 probative value is *substantially* outweighed by any prejudice, let alone the *unfair
 10 prejudice* required for exclusion under Rule 403.

11 A disputed issue in this case is whether Dr. Kang’s failed retrieval attempt, which
 12 admittedly damaged Ms. Booker’s tricuspid valve, was unduly aggressive. The Plaintiff
 13 claims Dr. Kang acted appropriately. Bard, however, will present expert and other
 14 evidence that Dr. Kang should have followed a more conservative approach. Indeed, the
 15 evidence is undisputed that Dr. Kang’s aggressive retrieval attempt caused Ms. Booker
 16 unnecessary harm.

17 Under Georgia law, the jury is entitled to consider whether Dr. Kang’s actions
 18 caused or contributed to Ms. Booker’s alleged injuries. *See Jordan v. Everson*, 806
 19 S.E.2d 533 (Ga. 2017). They are also entitled to evaluate his credibility and bias.¹ As
 20 such, Dr. Kang’s publicly-accessible social media posts, including the following tweet,
 21 are relevant and probative of his aggressive approach to filter retrievals:



23 Brandon Kang MD @BrandonKangMD · May 22
 24 #IRad cowboy 🤠 and his lasso 🥳 is all that's needed for simple #filterout in less
 than 5 min. #GTFO @SIRRFS @JMRmedia @Interventional2

25
 26
 27 ¹ Similarly, the jury is entitled to hear that he did not tell the Plaintiff that he damaged her
 28 tricuspid valve during the procedure that he performed. *See* June 15, 2017 Dep. Tr.
 Brandon Kang, M.D., (“Dr. Kang Dep. Tr.”) at 135, excerpts attached hereto as Exhibit A.

1 Contrary to the Plaintiff's argument, the evidence is plainly relevant to the
 2 disputed issue of Dr. Kang's approach and attitude about filter retrievals under Rule 401.
 3 During his deposition Dr. Kang testified in response to questions from the Plaintiff's
 4 counsel that he used a "lasso" to retrieve the Plaintiff's filter. *See Ex. A* Dr. Kang Dep.
 5 Tr., at 36:2-9. He also testified that the procedure he performed on the Plaintiff was "like
 6 a cowboy with a lasso." *Id.* at 111:3-9. Further, Dr. Kang admitted that his social media
 7 posts refer to his use of a snare as a "lasso" as he did in retrieving Ms. Booker's filter and
 8 he admits that the cowboy is a metaphor for him. *See id.* at 139:4 to 140:9.² He referred
 9 to it as "lighthearted humor" to describe a medical procedure. *Id.* at 159:12-160:2. Dr.
 10 Kang's social media accounts are public and he does not restrict access to them. *See id.*
 11 at 77:3-4 ("Q. It's publicly available? A. Yes.") He chose to use these phrases and emojis
 12 to describe his practice and his approach toward the retrieval of IVC filters, the very
 13 procedure at issue in this case. The social media posts are probative because they are
 14 unguarded and public affirmations of a witness's approach and attitude about a relevant
 15 issue in this case.

16 The Plaintiff likewise offers no argument that the probative value of this evidence
 17 is substantially outweighed by any unfair prejudice. That the evidence is simply
 18 prejudicial (as opposed to unfairly prejudicial) in that it tends to support Defendants'
 19 theory of the case is insufficient for exclusion under Rule 403. Indeed, the Plaintiff's
 20 counsel had a fair opportunity to examine Dr. Kang on this evidence at his deposition,
 21 and are free to designate his testimony about the posts to place them in context.³ Because
 22 the evidence is relevant to a disputed issue, and the probative value outweighs any
 23 prejudice, the Plaintiff's Motion should be denied.

24
 25
 26
 27 ² The fact that Dr. Kang chose to use an acronym ("#GTFO") that can have more than one
 meaning is a risk that anyone who posts publicly on social media should know when they
 take it.

28 ³ Bard understands that the Plaintiff will not call Dr. Kang live.

CONCLUSION

For these reasons, Bard respectfully requests this Court deny the Plaintiff's Motion *in Limine* No. 12.

RESPECTFULLY SUBMITTED this 9th day of February, 2018.

s/Richard B. North, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 2018, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to all attorneys of record.

s/Richard B. North, Jr.
Richard B. North, Jr.